85-349

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

DONALD TOMCZAK,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred in reversing the decision of the Trial Court sitting without a jury by employing the pre-*Anderson v. Bessemer City,* (— US —, 84 L.Ed.2d 518 (1985)) standard that the Appellate Court could reverse if left with the definite and firm conviction that a mistake was committed while completely ignoring the *Bessemer* standard that where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous and whether the Court of Appeals further erred by ignoring the issue of credibility of the witnesses when the Trial Court commented adversely upon the credibility of the Defendant's chief witness.

PARTIES

The parties in this case are the Plaintiff-Appellee in the United States Court of Appeals and the Petitioner herein, Donald Tomczak, and the Defendant-Appellant in the United States Court of Appeals for the Seventh Circuit and the Respondent herein, the City of Chicago.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is not yet published and is attached as Appendix A. The Findings of Fact, Conclusions of Law and Order of the Trial Court is not published and is attached as Appendix B.

———o———

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 17, 1985. A Petition for Rehearing *En Banc* was timely filed and was denied on August 5, 1985. (Appendix C) Jurisdiction to review the Opinion and Judgment of the United States Court of Appeals is conferred upon this Court by 28 USC 1254(1).

———o———

STATEMENT OF THE CASE

INTRODUCTION:

In the *Statement of the Case* Petitioner summarizes Defendant's theory of the facts from the Opinion below while detailing his own. The reason, of course, for the greater emphasis on his theory of the facts is to demonstrate that the Trial Court ruled on a permissible view of the evidence and hence that Court should not have been reversed. *Anderson v. Bessemer City,* — US — 84 L. Ed. 2d 518, 528 (1985). The Defendant's view of the facts is

detailed between pages 9 through 13 of Appendix A is also plausible.

There was much evidence in the record to support either view of the facts which was not alluded to in the Opinion below. However, Petitioner in I will refer only to the Opinion below since it is his view that the Seventh Circuit's Opinion shows that the Trial Court's view of the evidence was plausible. In II Petitioner will go beyond the Opinion in one instance to record an issue of credibility only because the Appellate Court did not discuss this aspect of the case.

I

The present case was tried as a contempt citation before Judge Nicholas Bua in the United States District Court for the Northern District of Illinois, Eastern Division. The Opinion below (Appendix A, pp. 2-5) gives a complete history of the *Shakman* litigation which spawned Petitioner's Rule to Show Cause.

Donald Tomczak was a city employee for almost 30 years. The Trial Court found by a clear and convincing burden of the evidence that Donald Tomczak's termination, shortly after a new city administration came to power, was politically motivated and that his position was not exempt from First Amendment protection. (See Appendix B, Findings of Fact, Conclusions of Law and Order) The Court of Appeals reversed, holding that the Plaintiff's position was exempt. The Court of Appeals and the District Court agreed on the law concerning exempt positions. The Court of Appeals reversed because after "—a thorough review of the record, we are left with the firm

conviction that the District Court was clearly erroneous in so finding." (That the position was protected by the First Amendment.) (Appendix A, pg. 13)

The evidence presented by the Defendant and which the Court of Appeals found plausible was that the Plaintiff had many and diverse responsibilities, a salary of $62,000 a year, 1,150 employees and an annual budget of forty million dollars. (Appendix A, pp. 11-13)

The Petitioner began to work as a laborer with the City of Chicago in 1958 and gradually worked his way on up from this position to that of First Deputy Commissioner of the Department of Water. (Appendix A, pg. 6) Though the Plaintiff had over 1100 employees within his bureau, he had an immediate office staff of nine individuals. (Appendix A, pg. 9) The bureau over which the Petitioner was the deputy had the responsibility for capital construction projects and for repair and rehabilitation of existing capital structures. (Appendix A, pp. 9) The Commissioner, Defendant's chief witness, testified that his Department's primary goal was to assure that adequate water supplies reached the city's homes and businesses as cheaply and efficiently as possible. The Commissioner further testified that decisions about which facilities to repair or replace were never made for political reasons. (Appendix A, pg. 10)

There were thus two aspects to the Plaintiff's job: (1) fix the pipes as quickly as possible and (2) put in new projects--that is, capital construction. Insofar as the second job was concerned, the Commissioner testified that Mr. Tomczak could approve the plans for new construction and send them on to him, the Commissioner. How-

ever, neither the Commissioner nor Mr. Tomczak could decide where and if new construction would take place. "Even (the Commissioner) had to defer to the City Council to determine if and when new construction would take place." (Appendix A, pg. 10)

The Court below pointed out that "a key witness at the trial was Thomas Bower, an engineer and Assistant Commissioner in the Department, acknowledged by both sides to be a professional employee without any allegiance to the city's fragmented Democratic Party." (Appendix A, pg. 7) "—Power testified that the Plaintiff's input could not jeopardize the Mayor's ability to administer the city." (Appendix A, pg. 10) Bower further testified that the Petitioner's "responsibilities are primarily as a manager in the Bureau of Water Distribution. He operates, more or less, under certain guidelines." (Appendix A, pg. 10)

The Trial Court also heard evidence that Tomczak could not install water meters, cut off service, transfer and appoint employees within his own bureau and perform other relatively mundane task without permission of the Commissioner. (Appendix A, pg. 10) There was only one other important factual matter not summarized in the Opinion by the Court of Appeals. The Trial Court's *Findings of Fact,* number 15 (Appendix B, pg. 27) points out that: "In 1981, Peat, Marwick & Mitchell prepared a report concerning the Department of Water, and determined that the Petitioner's duties were of a non-policy-making nature and that policies of his division were made directly by the Commissioner."

II. Credibility of the Witnesses:

In reaching its Decision, the Court of Appeals did not discuss nor consider the credibility of the witnesses below. Aside from the Petitioner, there were three witnesses, John Corey, the Commissioner of the Department of Water and the man directly responsible for terminating the Plaintiff, Charles Pounian, the Director of Personnel for the City of Chicago, and Thomas Bower who, as pointed out above, was acknowledged by both sides to be a professional employee without political allegiances.

The Director of Personnel testified that the Petitioner's role was key because he planned where new construction would be within the system (TR 202) but Mr. Pounian immediately agreed that Mr. Tomczak did not plan where new construction was and, indeed, not even the Commissioner could do that but that this was solely a function within the power of the Chicago City Council. (TR 203)

Commissioner John Corey was the Defendant's other witness. At one point the Trial Court found that Corey's deposition testimony impeached his trial testimony: "No it impeaches his earlier testimony, I think, in a material way.—" (TR 103)

ARGUMENT

The Decision Of The United States Court Of Appeals For The Seventh Circuit Merits Review Or A Per Curiam Reversal Because It Employs Pre-Anderson v. Bessemer City Standards In Reversing A Decision By The District Court Sitting Without A Jury When There Were Two Permissible Views Of The Evidence Which The District Court Heard And When The Appellate Court Did Not Consider Nor Comment Upon The Credibility Of The Witnesses Which The District Court Heard.

There was no argument as to the appropriate constitutional standards employed in determining whether Mr. Tomczak's position was exempt for purposes of firing an individual for political reasons. The Seventh Circuit's opinion agreed with that of the Trial Court and the Petitioner has no argument with either decision. The Court of Appeals reversed when, in reviewing the facts, it gave the Defendant, in effect, a trial *de novo*. In reviewing the facts the Court of Appeals referred to *Anderson v. Bessemer City* (at page 12) but did not employ the standards set forth in *Bessemer* but instead employed standards set forth in *United States v. United States Gypsum Co.*, 333 US 364, 395 (1948). (Appendix A, pg. 13) In only one instance did the Court refer to the standard it was employing in reviewing the evidence and reversing. The Court of Appeals stated that "—this Court may reverse the district court's finding that the Plaintiff's prosition was not exempt only if we are 'left with the definite and firm conviction that a mistake has been committed.' " *United States v. United States Gypsum Co.*, 333 US 364,

395 (1948). *Accord Anderson v. City of Bessemer City, North Carolina,* 53 U.S.L.W. 4315, 4317 (U.S. March 19, 1985) (Appendix A, pg. 13)

The Petitioner contends that *Anderson v. Bessemer City,* in fact, altered and strengthened the holding of the *United States Gypsum* standard. In *Anderson,* this Court pointed out that if the Trial Court's account of the evidence is plausible in light of the entire record, the Court of Appeals may not reverse even though convinced that had it been sitting as Trier of Fact it would have weighed the evidence differently. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (Citations)" *Anderson v. Bessemer City, Supra,* at page 528. The Court of Appeals summarized a view of the evidence heard by the Trial Court and which was extremely plausible in light of all the evidence. The Petitioner had worked for the City of Chicago for almost 30 years and under four Mayors. He started as a laborer and worked his way up to Deputy Commissioner of the Department of Water. The Water Department, unlike most City departments, was, in fact, a utility not dissimilar to that of the gas and electrical companies. The Commissioner of the Department of Water agreed that the work within the Petitioner's bureau had always been non-political. The only witness that both sides agreed was professional, non-patronage and apolitical, Thomas Bower, testified that the Petitioner was nothing more than a manager and he was not in a position to thwart any policies of the administration in power.

The Petitioner's bureau had two responsibilities. Fix leaks as quickly, efficiently and cheaply as possible and

to put in new construction. Insofar as the former is concerned, the Defendant's chief witness agreed that that was the Petitioner's job and that his duties had always been apolitical. Insofar as putting in new construction was concerned, the Defendant agreed that neither the Petitioner nor his boss, the Commissioner, had any authority to state where, when and if new construction would be put in, only the Chicago City Council had that power. Under the circumstances, the Trial Court found that the Petitioner's position was protected by the First Amendment and was protected by provisions of the Shakman consent judgment.

That is not to say that the Defendant did not have a very plausible view of the evidence. Clearly, the Petitioner held an extremely high, well paid position, had many responsibilities and supervised hundreds of employees. However, once the Trial Court heard the witnesses, personally viewed the evidence, and made a decision which was plausible in light of the entire record, then his choice cannot be clearly erroneous and the Court of Appeals should not have reversed.

The decision of the Court of Appeals also merits review and reversal because it ignored and did not give due regard to the "—opportunity of the Trial Court to judge —the credibility of the witnesses." (*Federal Rule of Civil Procedure* 52(a)) No mention whatsoever is made of the credibility of the witnesses despite the fact that the Trial Court at one point was forced to observe that the Defendant's main witness, Commissioner John Corey, had been impeached in a material way. (TR 103) (Indeed, the Court of Appeals in a prior decision had agreed with another Trial Court that the credibility of Dr. Charles

Pounian was seriously undermined. *U.S. v. City of Chicago,* 549 F 2d 415, 433 (7th Cir., 1977)) The only witness, other than the Petitioner, to testify was Thomas Bower whom all sides agreed was a professional, apolitical person and who agreed that Mr. Tomczak's position could not thwart the administration in power and further that Mr. Tomczak was merely a managerial person with no broad powers.

The decision below merits review because it greatly narrows this Court's holding in *Anderson v. Bessemer City.* While this Court may not wish to rehear and redecide a case which it, in effect, has decided (*Anderson v. Bessemer City, Supra*), this case does merit review because it gives the Court an added opportunity to underscore the importance of Appellate Tribunals not second guessing the Trier of Fact when there are two plausible views of the evidence and when there are witnesses whose credibility the Trial Court had an opportunity to determine. However, if the Court does not wish to rehash these areas, the Petitioner respectfully asks that this Court in a *per curiam* decision reverse the findings of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 84-1490, 84-1713, 84-1894

DONALD C. TOMCZAK,

Plaintiff-Appellee,

v.

THE CITY OF CHICAGO, an Illinois Municipal Corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 9148, Nicholas J. Bua, *Judge.*

Argued November 7, 1984—Decided June 17, 1985

Before FLAUM, *Circuit Judge,* PELL and WISDOM,* *Senior Circuit Judges.*

PELL, *Senior Circuit Judge.* Defendant below, the City of Chicago, appeals from the district court judgment in favor of plaintiff, Donald C. Tomczak, holding that appellant had violated the *Shakman* decree, which controls the use of political patronage in appellant's employment practices. Appellant raises three issues on appeal. The

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* John Minor Wisdom, Senior Circuit Judge for the Fifth Circuit, is sitting by designation.

first issue is whether the district court erred in holding that the position occupied by appellee was not exempt from the strictures of *Shakman*. Second, even if the position is subject to *Shakman*, appellant maintains that the district court was clearly erroneous in finding that appellee's discharge was politically motivated and not for just cause. Finally, appellant objects to the remedy ordered by the district court.

I. HISTORY OF THE *SHAKMAN* LITIGATION

In 1970, this court reversed the district court's dismissal of Shakman's complaint and held that the complaint stated a justicable cause of action and contained factual averments sufficient to survive a motion to dismiss. *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971). The complaint alleged that it was unconstitutional for public officials or political bodies to discharge or threaten to discharge employees under their control who refused to contribute money and work time to candidates supported by those officials or political entities.

A consent decree, entered in May 1972, attempted to eliminate, for employees of local governmental entities, any coercion or employment discrimination based upon political considerations. The decree enjoined the *Shakman* defendants from "conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time a governmental employee, upon or because of any political reason or factor." Reproduced in *Shakman v. Democratic Organization of Cook County*, 481 F. Supp. 1315, 1358 (N.D. Ill. 1979). The district court retained jurisdiction of the

case to enable the parties to enforce compliance with the decree and to resolve a number of still-disputed issues, including whether

> [c]ertain governmental employment positions . . . by their nature involve policy-making to such a degree or are so confidential in nature as to require that discharge from such positions should be exempt from inquiry under this Judgment. Jurisdiction is maintained to litigate the question of which governmental employment positions under such defendants' jurisdiction are so exempt for the foregoing reasons.

Id. at 1358-59.

Shortly thereafter, various defendants, who had refused to enter into the decree, filed motions to dismiss. The district court granted the motions concerning those portions of the complaint that challenged the hiring and firing of patronage employees based solely upon the political affiliation of the employee. *Shakman v. Democratic Organization of Cook County,* 356 F. Supp. 1241, 1244-49 (N.D. Ill. 1972). The district court reasoned that a newly elected or appointed official could replace employees of his predecessor based solely upon political affiliation, as long as he did not use hiring and firing practices to coerce political work or contributions. The United States Supreme Court subsequently has held that employees in nonpolicymaking and nonconfidential positions who are victims of patronage dismissals state a cause of action under the First and Fourteenth Amendments. *Elrod v. Burns,* 427 U.S. 347 (1976) (plurality opinion); *id.* at 374-75 (Stewart, J., concurring).

In 1979, the district court again addressed the patronage practices, particularly in hiring decisions, of those

defendants who had not entered the 1972 consent decree. *Shakman v. Democratic Organization of Cook County,* 481 F. Supp. 1315 (N.D. Ill. 1979). The court held that "the challenged patronage practices give the defendants an actual, significant advantage in elections" and, therefore, infringe the First and Fourteenth Amendment rights of the plaintiff candidates and voters. *Id.* at 1345. The court further held "that the non-consenting defendants have independently infringed the plaintiffs' constitutional rights through their use of patronage hiring, firing, and promotion practices, as well as through their conspiracy with the consenting defendants to practice and further patronage hiring practices." *Id.* at 1349 (footnote omitted). In a footnote, however, the court added the following caveat:

> It is the court's understanding that the plaintiffs are not challenging the defendants' use of political considerations in their employment decisions concerning policymaking officials, *see Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Newcomb v. Brennan,* 558 F.2d 825 (7th Cir.), *cert. denied,* 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977). The court's decision today does not affect government employees who are in that category.

Id. at 1353 n.46.

In a later decision, the district court adjudged "the hiring aspects of the *Shakman* case." *Shakman v. Democratic Organization of Cook County,* 569 F. Supp. 177, 178 (N.D. Ill. 1983). The court noted that the 1983 judgment attempted "to eliminate political considerations in the hiring of government employees." *Id.* The judgment included the following paragraph, labeled "Exempt Positions":

> Defendant Public Employers may, from time to time, apply to the Court for a determination that political

> party affiliation or activity are appropriate requirements for the effective performance of certain Governmental Employment positions and therefore hiring for or discharge from such positions should be exempt from inquiry under this Judgment and the Consent Judgment.

Id. at 182. In an appendix added to the opinion two months after the judgment, the district court, by motion of the City of Chicago, and with the consent of the *Shakman* plaintiffs, supplanted the earlier judgment with respect to the city and its mayor. The substantive provisions of the amended judgment were substantially similar to the earlier judgment, except for portions related to the exempt positions. The new judgment exempted approximately 1,200 city employees from the application of the *Shakman* decree. Included in the exempt list, known as Schedule G, were approximately thirty-three positions in the Department of Water, including the Assistant Commissioners of the Department, the First Deputy Commissioner of Water, and the Deputy Commissioner of Water Services. The district court also retained jurisdiction of the case

> to consider petitions requesting, for good cause, that particular positions listed in Part G should be deleted from the Schedule and to give such ather relief as may be appropriate . . . .
>
> No action taken with respect to any position while it remains on the Schedule shall be considered contempt of this Court under the 1972 Consent Judgment.

Id. at 207.

II. THE FACTS AND DISTRICT COURT PROCEEDING

A. The Termination.

Plaintiff began to work for the City of Chicago in 1958 and gradually worked his way up from a laborer's position to that of First Deputy Commissioner of the Department of Water. On November 16, 1983, plaintiff was terminated from his position as First Deputy Commissioner. Plaintiff then filed suit in the district court pursuant to the *Shakman* decree. He alleged that political motivations led to his dismissal in violation of the decree and that the district court had improperly included his position in Schedule G.

With respect to the allegedly politically motivated dismissal, the parties introduced a wide variety of evidence. Plaintiff attempted to establish that his relationship with John Corey, his superior and the Commissioner of the Department of Water, had always been professional and cordial until, without forewarning, Corey dismissed plaintiff. Plaintiff maintained that the mayor of the City of Chicago, or his associates, determined that plaintiff should be dismissed so that the mayor could replace him with someone who had political allegiance to the new administration. The evidence demonstrated that, less than one month after Corey sent a memorandum to the city's Bureau of Budget requesting that plaintiff's salary level be maintained, Corey terminated plaintiff, with blind copies of the termination letter sent to the corporate counsel, the mayor's chief assistant, and the mayor's press secretary.

A key witness at the trial was Thomas Bower, an engineer and Assistant Commissioner in the Department, acknowledged by both sides to be a professional employee without political allegiance to any faction of the city's fragmented Democratic party. Bower testified that he never had heard Corey criticize plaintiff and that the two men had "a very good working relationship." Although Bower often acted as a liaison between Corey and plaintiff, there were also direct phone calls and at least one face-to-face meeting between the two each week. Bower could not believe that Corey would have terminated plaintiff for political reasons.

Corey in his trial testimony, attributed the dismissal to a failure of communication and to a verbal confrontation that he had had with plaintiff in 1979, when plaintiff was the Deputy Commissioner in the Department. According to Corey, the two men later met with then Mayor Byrne, who reprimanded plaintiff, which Corey thought was an inadequate response. Plaintiff denied that the meeting ever took place. Later, in 1981, plaintiff received a promotion, made without consulting Corey, to First Deputy Commissioner, which made him second in command in the Department. The promotion resulted in higher pay for plaintiff, although he testified that he had no additional duties.

As to the communication failure, Corey testified that plaintiff forbade his staff members to communicate with Corey or his staff without plaintiff's permission and that plaintiff failed to provide Corey with essential information. The Commissioner of Personnel under Mayor Washington testified that he was aware of an antagonistic re-

lationship between plaintiff and Corey, which had resulted in several complaints by Corey. Corey maintained that, for all these reasons, and because he wanted to institute changes in plaintiff's Bureau that, he felt, necessitated changing the head of the Bureau, he made the unilateral decision to terminate plaintiff, without direction from Mayor Washington's administration and not based upon any political reasons. Plaintiff, on the other hand, testified that, aside from the unfortunate verbal confrontation in 1979, his working relationship with Corey was excellent. Plaintiff did not have any direct evidence that his removal was politically motivated, but, as he testified, "I just can't believe that it was Mr. Corey [who made the decision]. I just can't."

There was no evidence introduced at trial to show to which faction of the Chicago Democratic Party either Corey or plaintiff owed his allegiance, nor was there any direct evidence that the dismissal was due to political motivations. The circumstantial evidence, which plaintiff offerred to establish a politically motivated discharge offered to establish a politically motivated discharge, amounted to several things: first, Corey sent copies of plaintiff's termination letter to a number of high ranking officials in the mayor's office; second, neither Bower nor plaintiff could conceive of any reason, other than political considerations, why Corey would dismiss plaintiff, and both testified that a good working relationship had always existed between plaintiff and Corey; third, Corey had never criticized plaintiff's work in writing and only once orally a number of years earlier, despite numerous opportunities to present his alleged dissatisfactions to the mayor's office; and, finally, the city made no effort to find plaintiff,

a public servant for twenty-five years, an alternative position.

The district court found that plaintiff's termination was politically motivated. The court made oral findings of fact and conclusions of law. None of the findings relate to the question of political motivation, and the only conclusion on that subject was: "That the petitioner has met his burden in demonstrating by clear and convincing evidence that his termination was politically motivated."

B. The Exempt Position.

The dictates of the *Shakman* decree and the applicable Supreme Court cases placed the parties in the somewhat anomalous position of plaintiff trying to downplay the importance of his job while defendant sought to establish its importance. Corey, the Commissioner of the Department, reports directly to the mayor. The Department has three divisions, of which the Bureau of Water Distribution is one. Plaintiff's job as First Deputy Commissioner made him the highest level employee in the Bureau of Water Distribution. Although plaintiff's immediate office staff had only nine employees, the Bureau has 1,150 employees and an annual budget of approximately $40,000,000. Furthermore, whenever the Commissioner was absent, the First Deputy would assume the Commissioner's duties.

The Bureau has responsibility for capital construction projects as well as repair and rehabilitation of existing capital structures. The primary goal of the entire Water Department is to assure that adequate water supplies reach homes and businesses as cheaply and efficiently as possible. The Commissioner testified that decision about

which facilitie to repair or replace were never made for political reasons.

Plaintiff sought to establish that, although his job had great authority and responsibility, he could not thwart the goals of the new administration or set policy. Similarly, Bower testified that plaintiff's input could not jeopardize the mayor's ability to administer the city. Plaintiff maintained that his job functions were routine and did not include policymaking. According to plaintiff, the Commissioner had final-authority, and plaintiff had ot consult him, with respect to any decision to install water meters, cut off service, transfer and appoint employees within plaintiff's Bureau, and other relatively mundane tasks. As to new construction, the Engineering Department, which was part of plaintiff's Bureau, would develop plans and present them to plaintiff, who would approve the plans and then send them to Corey. There was no evidence that either plaintiff or Corey ever altered any engineering plans. Even Corey had to defer to the City Council to determine if and when new construction would take place. Bower's testimony was that plaintiff's "responsibilities are primarily as a manager in the Bureau of Water Distribution. He operates, more or less, under certain guidelines."

Defendant introduced a variety of evidence to establish the exempt status of plaintiff's position. A study rating the relative importance of all city management jobs rated plaintiff's job as one of the top fifty positions in city government. Plaintiff's salary was $62,000 per year, second only to Corey among all employees of the Water Department. Corey and the Commissioner of Personnel both testified that plaintiff's position carried great responsibility in both policymaking and policy implementa-

tion. Corey testified that, while he had final decision-making authority in most areas, plaintiff had initial responsibility for capital construction, new construction plans, budget requests, and the repair and maintenance of equipment. Corey stated that he would be unable to make policy decisions without recommendations and input from his First Deputy. Bower also testified that the First Deputy's input was very important to the Commissioner's decisionmaking.

In his own evaluation of his position, prepared in 1980, plaintiff attributed thirty percent of his job responsibilities to "[p]lan[ing], develop[ing] and recommend[ing] budget requirements for the Bureau," which requirements, plaintiff acknowledged, Corey usually accepted without changes. Plaintiff allocated the balance of his job responsibilities as follows: forty percent to "[m]anag[ing] the execution of the Bureau's maintenance and construction programs," twenty percent to "[r]ecommend[ing] to the Commissioner, the Bureau's Capital Improvement Program for the replacement and improvement of the distribution system," and ten percent to "[d]evelop[ing], coordinat[ing] and control[ling] the Bureau's activities to achieve its short- and long-range goals." Corey testified that plaintiff had significant responsibility in the allocation of personnel and financial resources and could frustrate execution of administration policies concerning the Water Department.

Corey further testified that the political affiliation and loyalty were important factors in the choice of a First Deputy. Similarly, Bower stated that the personal loyalty of a First Deputy for the Commissioner was a crucial

determinant in filling the position. Finally, the Director of Personnel, who characterized the position of First Deputy as a high-level, policymaking job, concurred in Corey's assessment that political affiliation was important for an employee in plaintiff's position.

The district court's findings with respect to the issue of exempt status were substantially more extensive than on the question of political motivation. Initially, the court found

> that, while the petitioner had broad policymaking decisions, these related to the repair and rehabilitation of the water system within the City of Chicago. None of these decisions involved such decisionmaking in which there would be room for principled disagreement on goals or their implementation, nor that this type of input would jeopardize the ability of the new officer, or the new Mayor in this case, to run his office.

Although finding that plaintiff's job "included the responsibility for all Bureau of Water activities as they relate to the operation, maintenance, repair, and new construction of the water distribution system which included assisting and formulating and disbursing a budget of approximately $40 million," the court went on to find that plaintiff had "no policymaking role at all in new construction." Furthermore, the job was "an essential and needed position." The court also found that

> the position of First Deputy Commissioner of the Department of Water is not properly listed as an exempt position in Schedule G . . . , in that the position does not involve policy to such a degree nor is it so confidential in nature with regard to policy, and is not a public office where party affiliation is such an

> appropriate requirement for the effective performance of the office involved that employment decisions concerning the position are required to be exempt from inquiry under the 1972 Consent Decree.

Finally, the court's first conclusion of law stated that defendant "has failed to meet its burden to establish that the position held by petitioner . . . is properly listed as an exempt position."

Having concluded that plaintiff's position was not exempt and that his termination was politically motivated, the district court held defendant in contempt for violation of the *Shakman* decree.

III. THE DECISION

Case law has established, and defendant does not contest, that the clearly erroneous standard of review, Fed. R. Civ. P. 52(a), applies to a district court's determination whether a particular government position is exempt from restrictions on politically based employment decisions. *Soderbeck v. Burnett County, Wisconsin,* 752 F.2d 285, 288-89 (7th Cir. 1985); *Shakman v. Democratic Organization of Cook County,* 722 F.2d 1307, 1310 (7th Cir. 1983), *cert. denied,* 104 S.Ct. 279. *Accord Jones v. Dodson,* 727 F.2d 1329, 1336 (4th Cir. 1984); *Gibbons v. Bond,* 668 F.2d 967, 969 (8th Cir. 1982); *Stegmaier v. Trammell,* 597 F.2d 1027, 1034 n.8 (5th Cir. 1979). Consequently, this court may reverse the district court's finding that plaintiff's position was not exempt only if we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). *Accord Anderson v. City of Bessemer City, North Carolina,* 53 U.S.L.W. 4315, 4317 (U.S. March 19, 1985).

The Supreme Court cases establish the framework for the analysis of questions about employment decisions of governmental entities based upon political affiliation. In the first, *Elrod v. Burns,* a plurality of the Supreme Court condemned, on First Amendment grounds, the patronage dismissals of nonpolicymaking employees, but allowed such dismissals of policymakers "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." 427 U.S. 347, 367 (1976). In an attempt to distinguish policymakers from nonpolicymakers, the plurality stated: "An employee with responsibilities that the not well defined or are of broad scope more likely functions in a policymaking position. . . . [C]onsideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals. *Id.* at 368. In a limiting concurrence necessary to establish a majority of the Court, Justice Stewart stated that "a nonpolicymaking, nonconfidential government employee can [not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375 (Stewart, J., concurring in the judgment).

The plurality opinion in *Elrod* relied, in large part, upon an earlier case in this court, in which the opinion noted that political affiliation is a legitimate "criterion in the selection of policy-making officials" and that "considerations of personal loyalty . . . may justify the employment of political associates in certain positions," but those factors would not apply to "positions such as janitors, elevator operators or school teachers." *Illinois State Employees Union, Local 34 v. Lewis,* 473 F.2d 561, 574 (7th

Cir. 1972) (Stevens, J., with one judge concurring in the result), *cert. denied,* 410 U.S. 928 and 410 U.S. 943 (1973).

In the second opinion, the Supreme Court abandoned the labels of "policymaker" and "confidential employee" for a more functional analysis. *Branti v. Finkel,* 445 U.S. 507 (1980). The Court stated: "rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved." *Id.* at 518. Thus, only if political loyalty is "essential to the discharge of the employee's governmental responsibilities," *id.*, can his patronage dismissal survive a First Amendment challenge. Under its new formulation, the Court held that "the continued employment of an assistant public defender cannot properly be conditioned upon allegiance to the political party in control of county government," *id.* at 519, because, in contrast to a public prosecutor who has broader public responsibilities, *see Livas v. Petka,* 711 F.2d 798, 799-801 (7th Cir. 1983), the assistant public defender's primary responsibility is to serve the needs of individual clients.

Preliminarily, we note that, although *Branti* addressed the problem of the termination by a newly appointed Democratic Public Defender, of the assistants of the prior Republican Defender, its reasoning applies with equal force to patronage dismissals when one faction of a party replaces another faction of the same party, *see, e.g., Joyner v. Lancaster,* 553 F. Supp. 809 (M.D.N.C. 1982); *Ecker v. Cohalan,* 542 F. Supp. 896 (E.D.N.Y. 1982), especially in election districts where a primary victory within the dominant party virtually assures victory in the subsequent general election, *see e.g., Barnes v. Bosley,* 745 F.2d 501, 506

n.2 (8th Cir. 1984); *McBee v. Jim Hogg County Texas,* 703 F.2d 834, 838 n.1 (5th Cir. 1983), *vacated en banc on other grounds,* 730 F.2d 1009 (5th Cir. 1984); *Stegmaier v. Trammell,* 597 F.2d at 1032 n.4. We take judicial notice of the fact that Chicago has been such an election jurisdiction. Indeed, defendant does not even claim that *Elrod* and *Branti* are inapplicable on this ground.

This court also notes that *Elrod* and *Branti* require examination of the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office. *Ness v. Marshall,* 660 F.2d 517, 522 (3d Cir. 1981); *Alfaro de Quevedo v. De Jesus Schuck,* 556 F.2d 591, 593 n.4 (1st Cir. 1977). *Mummau v. Ranck,* 531 F. Supp. 402, 405 (E.D. Pa. 1982), *aff'd,* 687 F.2d 9, 10 (3d Cir. 1982). Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that render his political affiliation an appropriate prerequisite for effective performance. In this court's reiteration of the *Branti* formulation, we emphasized the functions of the office involved, not the officeholder: "The test is whether the *position* held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Nekolny v. Painter,* 653 F.2d 1164, 1170 (7th Cir. 1981) (emphasis added), *cert. denied,* 455 U.S. 1021 (1982). The unarticulated purpose behind this approach seems to be two-fold; first, to resolve the issue entirely in one proceeding, thereby relieving the courts of the burden of having to re-examine a certain position every time a new ad-

ministration changes the mix of responsibilities bestowed upon the officeholder; and, second, to provide certainty to litigants. *See Ecker v. Cohalan,* 542 F. Supp. at 901.

The district court found that plaintiff's only area of decisionmaking authority, while broad within the area, related solely to the mundane decisions concerning the repair and rehabilitation of the water systems and that he had no decisionmaking authority in areas in which there could be principled disagreements about goals or their implementation. Consequently, the court found plaintiffs position protected against a patronage dismissal. After a thorough review of the record, we are left with the firm conviction that the district court was clearly erroneous in so finding.

The Supreme Court in *Branti* abandoned the use of "policymaker" status as having talismatic significance in the determination of which jobs are exempt from patronage dismissals. As this court has determined, an employee's position is unprotected if, first, there is room for principles disagreement in the decisions reached by the employee and his superiors, and, second, he has meaningful direct or indirect input into the decisionmaking process. *Nekolny v. Painter,* 653 F.2d at 1170.

Plaintiff maintains, and the district court found, that there was no room for principled disagreement in any of the areas in which plaintiff had significant decisionmaking authority. The district court apparently accepted plaintiff's contention that, because the goal of the Water Department was to provide service to all residents without regard to politics, there could be no principled disagreements about the basic policies of the Department. *Cf. Jones v. Dodson,* 727 F.2d at 1338. This is an unduly my-

opic view of the role of politics in the seemingly apolitical context of universal provision of services. Indeed, one of the biggest, if not the biggest, turning points in the 1979 Chicago mayoral election involved the provision of snow-removal services. The primary function of any local governmental entity is the provision of services such as police and fire protection, public schools, hospitals, transportation, and libraries, as well as quasi-utility functions such as water, garbage, and sewage services. Elections often turn on the success or failure of the incumbent to provide these services, and, as campaigns develop, the opposing sides put forth varying proposals about how best to provide services. While the ultimate goal of all sides might be the same, there is clearly room for principled disagreement in the development and implementation of plans to achieve that goal. Therefore, the fact that plaintiff's position concerned the provision of water to all citizens does not mean that the Water Department had no goals about which there could be principled disagreements.

A related argument by plaintiff is that he performed merely ministerial functions. Yet, the position that he occupied, the second highest job in a large and vital city Department, included the administration of a Bureau with 1,150 employees and an annual budget of about $40,000.000. Moreover, it is the position, not the duties performed by a particular occupant of that position, to which we must look to determine if plaintiff is exempt from the prohibition against patronage dismissals. The sheer size of the Bureau's staff and budget, particularly in light of the fact that his annual $62,000 salary was second highest in the Department, suggests that plaintiff was in a position where his political affiliation could affect the ability of a new

administration to implement new policies. Furthermore, even plaintiff acknowledged that he spent thirty percent of his time planning, developing, and recommending the Bureau's budgetary requirements and ten percent of his time developing, coordinating, and controlling "the Bureau's activities to achieve its short and long-range goals." These are not functions of a merely ministerial officeholder. Finally, that plaintiff never altered the new construction plans developed by his Bureau's Engineering Department is irrelevant because his supervisory position certainly gave him the authority to amend the plans before he forwarded them for further action.

The present case in entirely unlike *Stegmaier v. Trammell,* 597 F.2d 1027 (5th Cir. 1979), in which the court held clearly erroneous a district court's finding that a Deputy Circuit Clerk, second-in-command only to the Circuit Clerk, was a policymaker. The appellate court noted that the Circuit Clerk did not set policy for the Clerk's office; rather, the Administrative Director of the state court system established policy, thus drastically limiting the discretion of both the Clerk and his deputies. *Id.* at 1034-35. *See also Barnes v. Bosley,* 745 F.2d at 508. The court contrasted the deputy clerkship with positions that demand something more than simply ministerial competence, where the employee creates or implements policy and has broad responsibilities with ill-defined objectives. *Id.* at 1035.

The present case presents a situation strikingly similar to the one hypothesized in *Stegmaier.* No outside authority limited the discretion of the Water Department in the development and implementation of plans. The evidence is uncontradicted that, even though ultimate

decisionmaking authority in most areas rested with the Commissioner, plaintiff had substantial input into those decisions. Plaintiff's duties were not strictly circumscribed, and, according to his own position evaluation, required something substantially more than simple ministerial competence. *See Newcomb v. Brennan,* 588 F.2d 825, 829-30 (7th Cir. 1977), *cert. denied,* 434 U.S. 968.

Plaintiff's situation more closely approximates that of the claimant in *Shakman v. Democratic Organization of Cook County,* 722 F.2d 1307 (7th Cir. 1983), *cert. denied,* 104 S. Ct. 279, in which this court held the second highest employee of the Chicago Park District to be exempt from protection. The factors enunciated by this court in support of the decision included the claimant's lofty status and the concomitant concern with considerations of political loyalty, the fact that his responsibilities were not narrowly defined, and the fact that he had meaningful input into the Park District's policies and goals. Plaintiff's position is virtually identical.

In a further effort to demonstrate that plaintiff lacked decisionmaking authority, plaintiff refers to the fact that the City Council had to approve all construction plans proposed by the Department. Yet, plaintiff acknowledges that he was the first supervisor to review plans developed by the Department's engineers. The executive branch of a municipal government is not always in agreement with the legislative branch, and the fact that policies with respect to new construction must be formulated by the Commissioner and Deputy Commissioner could have significant impact on the administration's ability to carry out its policies. Without the ability to entrust the furtherance of those policies to plaintiff, Corey

could not ensure adequate support for the administration's goals. Therefore, we hold that defendant has fulfilled its burden under *Branti* to establish that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel,* 445 U.S. at 518. Plaintiff's position involved meaningful input into decisionmaking in areas where there could be principled disagreements. *Nekolny v. Painter,* 653 F.2d at 1170. The district court was clearly erroneous in finding to the contrary.

Lastly, plaintiff looks to the fact that his position was deleted from the city budget after his dismissal as an indication that the dismissal was politically motivated, because both sides agreed that the position was one of great importance. The assertion of critical importance is certainly consistent with out conclusion that plaintiff's position was exempt from the *Elrod-Branti* restrictions, a conclusion that relieves this court of the need to address the issue of political motivation as well as the other issues raised by the parties. We note, in passing, that plaintiff's last argument—that the elimination of an employee's position after his dismissal indicates that the dismissal was politically motivated—might unduly constrain a new administration from attempting to achieve cost efficiencies by reducing the size of its executive work force. *See Tanner v. McCall,* 625 F.2d 1183, 1194-96 (9th Cir. 1980), *cert. denied,* 451 U.S. 907 (1981). For, as we have recently stated, "the purpose of the policymaker exemption . . . is to ensure that the first amendment's protection not interfere with the workings of democratic governments and the ability of duly elected officials to

implement their policies." *Shakman v. Democratic Organization of Cook County,* 722 F.2d at 1310.

We acknowledge the district court's concerns with the unfortunate aspects of the dismissal of a public servant who labored long in service to the city and rose to a high rank only to discover that achieving that rank leaves him unprotected from patronage dismissals. We find it regrettable that defendant has been unable to accommodate plaintiff in another capacity, despite his express willingness to take a lower paying job. Nonetheless, these concerns do not affect our analysis of the legal issues involved.

IV. CONCLUSION

The finding of the district court that plaintiff's position was protected against patronage dismissal is clearly erroneous. We find that the position of First Deputy Commissioner of the Chicago Water Department is exempt from protection. Accordingly, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

FINDINGS OF FACT

The Court, therefore, makes the following Findings of Fact pursuant to Rule 52(a) of the Federal Rules of Civil Procedure:

1. That petitioner, Donald Tomczak, is a resident, registered voter, and taxpayer in the City of Chicago, Illinois.

2. Respondent, City of Chicago, is an Illinois municipal corporation.

3. On May 5, 1972, a Consent Decree was entered in the case at bar, case entitled *Shakman v. Democratic Organization of Cook County,* No. 69 C 2145 (N.D. Ill., E.D. 1972).

4. The injunctive provisions of the Decree by their terms are applicable to and binding upon the City of Chicago, its agents, servants and employees.

5. This cause comes on to be heard upon a complaint, really now in light of the amendment pursuant to 15(b), a petition for rule to show cause why the respondent, City of Chicago, should not be held in contempt of court for violation of the *Shakman* Decree, and the jurisdiction of the Court is not disputed.

6. Pursuant to Paragraph E(1) of said Decree:

> "E. Each and all of the defendants and others are permanently enjoined from directly or indirectly in whole or in part:
>
> > "(1) Conditioning, basing or knowingly prejudicing or affecting any term or aspect

> of governmental employment with respect to one who is at the time already a government employee upon or because of any political reason or factor."

7. On June 20, 1983, a Consent Decree ercaptioned: "Judgment as to the City of Chicago and its Mayor" was entered under which there were listed at Schedule G certain job codes with job titles with the City of Chicago that were to be exempt from the requirements of E(1) of the Consent Decree of May 5, 1972, these exemptions being recognized pursuant to the following language of Paragraph N of the June 20, Consent Decree which reads:

> "N. Exempt Positions. The governmental employment conditions under the control of the City of Chicago as listed in the attached Schedule of Exempt Positions are positions exempt from this Judgment and the 1972 Consent Judgment".

8. The Consent Decree of June 20, at Paragraph 8 also sets forth one of the controlling tests to determine whether a position is properly listed under Schedule G as exempt. That test is set forth as follows:

> "However, each position so added to Part G of the Schedule must be a position which involves policy to such a degree or is so confidential in nature with regard to policy that employment decisions concerning the positions are required to be exempt from inquiry under this Judgment and the 1972 Consent Judgment".

The other tests are as follows:

> "Whether party affiliation is an appropriate requirement for the effective performance of the office involved".

and as stated in *Nekolny v. Painter,* 653 F.2d 1164 (7th Cir., 1981):

> "Whether the position held by the individual authorizes either directly or indirectly meaningful input into government decisionmaking or issues where there is room for principled disagreement on goals or their implementation".

In addition, *Nekolny* requires not only that respondent demonstrate that the petitioner had meaningful input into decisionmaking, but also that the petitioner had that type of input that jeopardized the ability of the new officer, in this case, the new Mayor, to run his office.

The Court specifically finds that while the petitioner had broad policymaking decisions, these related primarily to the repair and rehabilitation of the water system within the City of Chicago. None of these decisions involved such decisionmaking in which there would be room for principled disagreement on goals or their implementation, nor that this type of input would jeopardize the ability of the new officer, or the new Mayor in this case, to run his office.

9. On the same day, June 20, 1983, a second Consent Decree was entered which was captioned: "Order Retaining Jurisdiction as to City Exemptions" under which this Court retained jurisdiction to allow city employees at that time holding exempt positions under Schedule G to file petitions to contest the scheduling of their job positions as exempt. As you all recall, that provision did not require a clear and convincing showing that these positions were not exempt, but in light of the Court's ruling, I don't know how important that becomes.

The relevant language of the Order reads as follows:

> "By this Order, the Court retains jurisdiction to consider petitions requesting for good cause that particular positions listed in Part G should be deleted from the Schedule and to give such other relief as may be appropriate. Such petitions may be filed only by persons currently holding a position on the Exempt List who shall have been discharged or demoted from, or are notified seven days in advance of the city's intention to discharge or demote them from the jobs."

10. Petitioner in this case, a 20-year City of Chicago employee at the time of termination by the respondent, was employed by the Department of Water in the position of First Deputy Commissioner of the Department of Water, which position is listed on Schedule G of the June 20, Judgment as follows:

"Title Code 9697.

11. That petitioner's salary was $62,148 per annum.

12. As a Deputy Commissioner and First Deputy Commissioner, the petitioner was one of three Deputy Commissioners reporting to the Commissioner of Water who, in turn, reported to the Mayor of the City of Chicago.

13. The petitioner's job as Deputy Commissioner included the responsibility for all Bureau of Water activities as they relate to the operation, maintenance, repair, and new construction of the water distribution system which included assisting and formulating and disbursing a budget of approximately $40 million.

14. The petitioner, as Deputy Commissioner, enjoyed no policymaking role at all in new construction.

15. In 1981, Peat, Marwick and Mitchell prepared a report concerning the Department of Water, and determined that the petitioner's duties were of a nonpolicy-making nature and that policies for his Division were made directly by the Commissioner.

16. After the petitioner became Deputy Commissioner and First Deputy Commissioner, there was almost daily contact between the petitioner and the Commissioner of Water. The Court further finds that only on one occasion, and that in November 1979, did the Water Commissioner, John Corey, criticize the petitioner. The Court finds that the petitioner received outstanding recommendations through his years with the Department of Water.

17. The evidence clearly demonstrates both from the testimony of John Corey and Thomas Bower, and as evidenced by Respondent's Exhibit No. 3 in evidence that the position of the petitioner was an essential and needed position.

18. That petitioner has filed a verified petition in connection with an alleged violation of the *Shakman* Decree wherein he alleges that his job title was improperly listed as an exempt position under Schedule G of the June 20, Judgment, and that his termination was politically motivated.

19. That in considering the totality of the evidence, the position of First Deputy Commissioner of the Department of Water is not properly listed as an exempt position in Schedule G of the Judgment as to the City of Chicago and its Mayor of June 20, 1983, in that the position does not involve policy to such a degree nor is it so con-

fidential in nature with regard to policy, and is not a public office where party affiliation is such an appropriate requirement for the effective performance of the office involved that employment decisions concerning the position are required to be exempt from inquiry under the 1972 Consent Decree.

20. On November 9, 1983, a decision was made by the respondent to terminate the petitioner, Donald Tomczak, as First Deputy Commissioner of the Department of Water effective November 16, 1983.

Those are the findings, the oral Findings of Fact. To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are hereby adopted by the Court as Conclusions of Law.

CONCLUSIONS OF LAW

On the above and foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

1. That the respondent has failed to meet its burden to establish that the position held by petitioner, Donald Tomczak, First Deputy Commissioner of Water of the Department of Water, is properly listed as an exempt position under Schedule G of the Judgment as to the City of Chicago and its Mayor dated June 20, 1983.

2. That the petitioner has met his burden in demonstrating by clear and convincing evidence that his termination was politically motivated.

2. That respondent, City of Chicago, is hereby found in contempt of court for the violation of the *Shakman* Decree

4. Petitioner is entitled to judgment against the respondent for his costs and attorney's fees, and it is hereby ordered that the petitioner be reinstated into the position of First Deputy Commissioner of Water with all back pay and all other benefits less any Unemployment Compensation benefits received during the time he was out of work and any salaries earned during petitioner's period of unemployment. And the petitioner is hereby directed to file a petition setting forth any such amounts, and also petitioner's attorney is directed to file within ten days of this order his petition for attorney's fees.

Finally, to the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, they are hereby adopted by the Court as Findings of Fact.

ORDER

The clerk accordingly is ordered and directed to enter a judgment against the respondent and in favor of the petitioner on petitioner's complaint for violation of the *Shakman* Decree pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure, the Court reserves the right to amend its Findings and Conclusions and to make additional Findings of Fact and/or Conclusions of Law upon motion of either party made no later than ten days from today, and it may amend the judgment accordingly.

I would just like to add a postscript to these Findings, and that is I had early in the process of entering the Consent Decrees relating to the hiring portion of the

provisions of *Shakman* expressed my concern with reference to long-time employees who were employed by the city in a menial task and by virtue of dint of their effort and hard work elevated themselves to a position where they finally enjoined a good salary and a high office, but by the same token, by virtue of the Exempt Positions Agreement which was hammered out between the plaintiffs in *Shakman* and the defendants, where the employees had no input, and by virtue of their being included in these exempt positions, they have found all their good work and hard work went to naught, and here by virtue of the signing of this Decree, they will lose their job. I felt there was something really wrong with that. And the Court suggested, as you recall in this case, Mr. Hubert, that perhaps what should happen to such a highly valued employee of the City of Chicago, a fine public official, at the very least, is that he should be put back in a position where he does not make those policy decisions nor has any input in making those decisions.

This is a difficult case, and I thought a case that should be settled because of the Court's concern for these long-time employees who succeed in their job and do well and find themselves in the position that because of it they now can be fired at the whim of a new public official.

I am certain that Mr. Tomczak will probably sit down with the city even after this Court's Order and this Judgment and be willing to accept a position in the City of Chicago, with probably less money than the sixty-two some odd thousand dollars that he earned, but at least a position where both the city and the inhabitants of the city can take advantage of his fine, fine work for the city. If

not, then presumably you are in the Seventh Circuit, and if it is affirmed, his title will be opened up, reinstated, and he will be placed in that job.

MR. MURPHY: Thank you, your Honor.

MR. TOMCZAK: Judge, I would like to thank you on behalf of my family and myself.

THE COURT: You don't have to thank you. I call them, Mr. Tomczak. The City wins some and they lose some. You are entitled to it under the law. There is no need to thank the Court.

CERTIFICATE

I certify that the foregoing is an accurate transcript from the record of proceedings in the above-entitled matter.

/s/ Agnes M. Thorne April 19, 1984
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. WILBUR F. PELL, JR., Senior Circuit Judge

Hon. JOHN MINOR WISDOM, Senior Circuit Judge*

Nos. 84-1490, 1713, 84-1894

DONALD C. TOMCZAK

Plaintiff-Appellee,

vs.

THE CITY OF CHICAGO,
An Illinois Municipal Corporation,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Illinois,
Eastern Division
No. 83 C 9148
Nicholas J. Bua, *Judge*

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, all of the judges on the panel having voted to deny the petition for rehearing and no active judge of the

---

* John Minor Wisdom, Senior Circuit Judge for the Fifth Circuit, is sitting by designation.

court having called for a vote on the suggestion of rehearing *en banc*

IT IS ORDERED that the petition for rehearing and suggestion that it be reheard *en banc* be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD TOMCZAK,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in reversing the judgment of the District Court when the District Court applied an erroneous legal standard to essentially undisputed material facts.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Donald Tomczak, First Deputy Commissioner of the Department of Water of the City of Chicago, was discharged from his position by the City in November 1983. He filed this case alleging that he had been discharged for political reasons and that his position was one for which political motivations could not be the cause for dis-

charge. The District Court ruled in Mr. Tomczak's favor on both issues. (App. 23-31.)*

The United States Court of Appeals for the Seventh Circuit reversed on the ground that Mr. Tomczak's position was exempt from the prohibition against political motivations being factors in a discharge decision. (App. 9-22.) Having concluded that politics could be considered in the discharge decision, the Seventh Circuit did not reach the issue whether Mr. Tomczak had, in fact, been discharged for political reasons, although it indicated that it would have ruled for the City on that issue as well. (App. 8-9.)**

Contrary to Mr. Tomczak's assertion, the issue decided by the Seventh Circuit—whether the First Deputy Commissioner position was exempt from the prohibition against consideration of political factors—did not turn on a choice of two plausible versions of the relevant facts. The legally material facts related to the inherent authority and responsibility of the First Deputy Commissioner position and not to Mr. Tomczak's actual performance of his job. Judged by that criterion, the evidence manifestly established that Mr. Tomczak's First Deputy position was exempt.

The relevant evidence regarding Mr. Tomczak's position is as follows. Mr. Tomczak was First Deputy Commissioner of the Department of Water when he was dis-

---

* "App." refers to the Appendix to the Petition for a Writ of Certiorari. "Tr." refers to the transcript of proceedings of the trial, which occurred on March 13, 1984.

** At the trial, no direct evidence whatsoever was adduced to show that the discharge of Mr. Tomczak was caused in any way by politics; nor was there circumstantial evidence sufficient to support such a finding. (See App. 8-9.)

charged. The City of Chicago is one of the largest municipalities in the country, and the Department of Water is one of the major departments in the City. The First Deputy Commissioner's job is one of the top 50 positions of the approximately 41,000 positions in the entire City government. Within the Department of Water, it is the second most important position, the Commissioner being the first. The First Deputy supervises and controls 1150 employees (almost half of the Department's personnel) and a $40,000,000 budget. The First Deputy is in charge of the Department in the absence of the Commissioner. Mr. Tomczak's salary as First Deputy Commissioner was $62,000 per year, the second highest among the Department's 2500 employees; only the Commissioner received more. (App. 6-7, 9-10; Tr. 53, 74, 82-84, 134, 180, 201.)

The First Deputy Commissioner position was one of importance, involving policy-making and policy-implementing activities. Subject to the ultimate authority of the Commissioner, the First Deputy was responsible for the repair and maintenance of the capital equipment in his Bureau; for capital construction for a water system serving the City; for developing new construction plans; and for preparing his Bureau's budget requests. (App. 9-11; Tr. 9, 17-18, 73, 75-77, 80, 201.)

In 1980, before the dispute over his discharge existed and before he had any reason to denigrate his own position and authority, Mr. Tomczak prepared an evaluation report about his own position. In that report, Mr. Tomczak stated that thirty percent of his job responsibilities was to plan, develop and recommend budget requirements, forty percent was to manage and execute maintenance and construction programs, twenty percent was to recommend a capital improvements program for replacements and improvements in the water distribution system, and ten per-

cent was to develop, coordinate and control activities to achieve his Bureau's short-term and long-term goals. (App. 11.) Mr. Tomczak testified that this document and similar documents accurately reflected his duties and responsibilities. (Tr. 190-191.)

The Commissioner of the Department of Water testified that, while he as Commissioner ultimately set Department policy and had final decision-making authority, he could not make policy without recommendations and input from the First Deputy Commissioner, and he frequently sought such recommendations and input. As the Commissioner put it, in formulating policy "He [Mr. Tomczak] was the second person on the way up." (Tr. 119.) The Commissioner further testified that loyalty and political affiliation were important factors for someone as highly placed as Mr. Tomczak. Mr. Tomczak had significant responsibility regarding the allocation of personnel and financial resources. Mr. Tomczak's own witness, Mr. Bower, an employee in the Department of Water, testified that the Department of Water was one of the most important departments in the City providing one of the most basic City services, that input from the First Deputy Commissioner was very important to decision-making by the Commissioner, and that personal loyalty of the First Deputy was an important factor in who should hold the position. The City's Director of Personnel testified confirming the high-level and policymaking character of the First Deputy position. (App. 10-12; Tr. 9-10, 26, 31, 36-37, 76-77, 79, 84-92, 111-114, 116, 119, 134, 142-144, 151, 201.)

Against this evidence, Mr. Tomczak's tack was to assert that he was not performing the important, substantive aspects of his job and that he was merely doing routine, "flunkie" work. (App. 10.)

SUMMARY OF ARGUMENT

This case has been fully and fairly reviewed by the Seventh Circuit, and it involves nothing worthy of further review by this Court. In line with this Court's opinions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), the Seventh Circuit correctly looked at the functions of the position in determining that politics could be considered in discharging the incumbent First Deputy Commissioner. On that central issue, which is the only legally material fact involved in this case, there was no dispute. Petitioner's focus on some factual dispute concerning his personal performance in the position is therefore misplaced because, as the Seventh Circuit correctly held, it is the inherent powers of an office, rather than the performance of the particular occupant of the office, which is controlling.

Contrary to Petitioner's assertion, the standard of review applied by the Seventh Circuit properly followed this Court's decision in *Anderson* v. *Bessemer City*, ____ U.S. ____, 84 L.Ed.2d 518 (1985), and therefore, there is no conflict with a decision of this Court. Reversal of the trial court by the Seventh Circuit was proper, and the writ should not be granted.

ARGUMENT

I. THE DECISION BELOW IS CORRECT.

The Seventh Circuit recognized that the trial court applied the wrong legal criterion and thus ignored the legally relevant facts in ruling for Mr. Tomczak. In line with this Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), it is clear that, in determining whether political factors can be the cause for discharge of a public employee, it is the job that counts, not the employee's individual performance or nonperformance in the job. The Seventh Circuit stated (App. 16-17):

> This court also notes that *Elrod* and *Branti* require examination of the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office. [Citations omitted.] Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that render his political affiliation an appropriate prerequisite for effective performance. In this court's reiteration of the *Branti* formulation, we emphasized the functions of the office involved, not the officeholder. . . .

Given this legal premise, the Seventh Circuit was clearly correct in holding that the First Deputy Commissioner position was exempt, and the trial court was clearly wrong in holding to the contrary. The First Deputy position is the second most important position in a major City department, a position ranked in the top 50 out of 41,000 City jobs. The First Deputy Commissioner was in charge of the entire department whenever the Commissioner was

absent. He was in charge of a major Bureau of the department on a daily basis, commanding 1150 workers and a $40,000,000 budget. The position inherently had broad responsibilities in developing and effectuating policy, and before he had a reason to downplay his job, Mr. Tomczak said as much. All of Mr. Tomczak's evidence, which the trial court relied upon, that he was performing merely ministerial tasks without regard to the job's inherent duties, even if believed, is legally irrelevant.* It is the duties inherent in the position which are determinative, not the functioning of the current incumbent. (App. 16-21.) There was no dispute on the basic evidence about the inherent importance and substance of the First Deputy Commissioner position.** The Seventh Circuit's ruling in favor of the City on this issue follows the decisions of this Court in *Elrod* and *Branti*.

II. THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT.

As a basis for his petition, Mr. Tomczak attempts to create a purported conflict between the Seventh Circuit

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* The arguments made by petitioner that the Seventh Circuit failed to give proper deference to the trial court's view of the credibility of the witnesses are misplaced. There was no issue of credibility germane to the key issue: the inherent powers and duties of the First Deputy Commissioner position. Indeed, the credibility gap which is relevant is Mr. Tomczak's in denigrating his top-level position.

** Once the importance of the First Deputy Commissioner position is recognized, the conclusion that it is an exempt position cannot be avoided, as Mr. Tomczak would have it, by calling the Department of Water "non-political." In city government, the planning and responsibility for the delivery of a fundamentally important city service clearly is political. The Seventh Circuit properly rejected the trial court's contrary view, which the Seventh Circuit stated was "unduly myopic." (App. 17-18.)

and a recent decision of this Court where none, in actuality, exists.

Earlier this year, this Court issued its decision in *Anderson* v. *Bessemer City*, ____ U.S. ____, 84 L.Ed.2d 518 (1985), which further explained the correct standard of review to be applied by appellate courts in regard to findings of fact by trial courts. This Court concluded that an appellate court could not meet the clearly erroneous standard, if between two plausible views of the facts, the trial court chose the one which the appellate court itself would not have chosen. In *Anderson*, this Court did not repudiate the other principles concerning the standard of review which are set forth in its prior decisions, such as *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948).

The Seventh Circuit was fully aware of *Anderson* when it decided this case, Mr. Tomczak having promptly brought *Anderson* to the court's attention. The Seventh Circuit neither stated that it would not follow *Anderson*; nor did it articulate a standard of review which was inconsistent with *Anderson*. Rather, the Seventh Circuit explicitly cited and relied on *Anderson*. (App. 13.)

No error should be inferred from the Seventh Circuit's citation of *United States Gypsum Co.* (App. 13.) Indeed, this Court in *Anderson* cited *United States Gypsum Co.* as having enunciated the "foremost" principle on the issue of the appropriate standard of review. *Anderson* is an elaboration on the application of that principle. These two decisions are to be read and applied together, which is what the Seventh Circuit did. Thus, there is no conflict with any decision by this Court.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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No. 85-349

In The
Supreme Court of the United States
October Term, 1985

DONALD TOMCZAK,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

REPLY BRIEF OF THE PETITIONER IN RESPONSE TO THE BRIEF IN OPPOSITION OF THE RESPONDENT

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REPLY BRIEF

Pursuant to Rule 22.5 the Petitioner files a Reply Brief Because the Respondent's Sole Argument in its BRIEF IN OPPOSITION Relies Entirely Upon Arguments Not Raised in the Petition for Certiorari and First Raised in the Respondent's Brief in Opposition

Rule 22.5 of the United States Supreme Court Rules allows for the filing of a Reply to a Brief in Opposition to a Petition for Certiorari when that Brief in Opposition raises arguments not addressed originally by the Petition for Certiorari.

In its Brief in Opposition, Respondent argues that the Trial Court was reversed because it erred by considering what the Petitioner personally did and not what the responsibilities of his position were. (Page 6)

Not only does the Petition for Certiorari not present this issue, but this is a gross misstatement of the Seventh Circuit Opinion. The United States Court of Appeals never accused the Trial Court of employing improper standards in reaching its decision. In fact, the Seventh Circuit pointed out that the Trial Court found it was "the Plaintiff's position" that was protected against patronage dismissal. The Seventh Circuit was of the opinion that reversal was mandated because the facts did not support this decision of the Trial Court.

> "The District Court found that Plaintiff's only area of decisionmaking authority, while broad within the area, related solely to the mundane decisions concerning the repair and rehabilitation of the water systems and that he had no decisionmaking authority in areas in which there could be principled disagreements about

> goals or their implementation. *Consequently, the Court found Plaintiff's position protected against a patronage* dismissal. *After a thorough review of the record, we are left with the firm conviction that the District Court was clearly erroneous in so finding.*" (emphasis added) App. 17*

The Trial Court itself specifically stated (App. 25) that the test employed in reaching its decision was, " 'whether the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decisionmaking or issues where there is room for principled disagreement on goals or their implementation.' " (Citing *Nekolny v. Painter*, 653 F 2d 1164 (7th Cir., 1981)

The Respondent's argument is a weak attempt to divert the Court's attention from the real issue which is that the standard employed by the Appellate Court in reversing the Trial Court was erroneous in light of *Anderson v. Bessemer City*, — US —, 84 L. Ed. 2d 518 (1985) since the Appellate Court Opinion itself evidences that the Trial Court was faced with two plausible views of the evidence and hence its decision could not be clearly erroneous.

Respectfully submitted,

PATRICK T. MURPHY

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*"App." refers to the Appendix in the Petition for a Writ of Certiorari.